No. 86-39 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS

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November 20, 1986

QUESTIONS PRESENTED

1. Whether the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, prohibits secondary picketing and empowers a federal court to enjoin such picketing, notwithstanding the restrictions on the court's equity power embodied in the Norris-LaGuardia Act.

2. Whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, precludes a federal court from enjoining secondary picketing by a rail union against rail carriers no matter how remote the connection between the primary employer and the picketing victims.

PARTIES TO THE PROCEEDING

Other respondents, in addition to those in the caption, are the following listed International and Local officers of the respondent labor organization: *

O.M. Berge
O.E. Henderson
D.D. Bartholomay
W.E. Merrill
J.T. McGill
M.H. Fleming
G. Vallera
G.L. Hockaday
W.A. House
L. Gonzalez
J. Dodd
T.A. Denton
F.E. Wallace
N.J. Marquar
B.L. Watts
A.J. Popp
D.E. DeLoach

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* The corporations which require disclosure pursuant to Rule 28.1 of the Rules of this Court are listed in Pet. App. 62a-70a. One of the petitioners, CSX Transportation, Inc., was formerly incorporated under the name Seaboard System Railroad, Inc. It changed its name on July 1, 1986.

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BRIEF FOR PETITIONERS

Petitioners Burlington Northern Railroad Company ("Burlington Northern"), Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively "Union Pacific"), The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), Baltimore and Ohio Railroad Company ("B&O"), Baltimore and Ohio Chicago Terminal Company ("B&OCT"), Chesapeake and Ohio Railway Company ("C&O"), and CSX Transportation, Inc. ("CSXT") (hereinafter "the Railroads") seek reversal of the decision and judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 793 F.2d 795 (7th Cir. 1986). The opinion of the district court (Pet. App. 24a-45a) granting the Railroads' motions for a preliminary injunction is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986. Pet. App. 48a. The order of the court of appeals denying rehearing was entered on July 8, 1986. Pet. App. 46a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of certain sections of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152; 152 First, Second and Seventh; 155 First; 156; 157 and 160; and certain sections of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113. Those statutory provisions and other related sections are reproduced in Pet. App. 50a-58a. Those provisions must be interpreted in light of other statutes, including Section 8 (b) (4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b) (4), and Section 11101(a) of the Interstate Commerce Act, 49 U.S.C. § 11101(a), which are set forth in Pet. App. 59a-61a.

STATEMENT OF THE CASE

1. This case arises out of a bargaining dispute under the RLA between respondent Brotherhood of Maintenance of Way Employes ("BMWE") and two small railroads located in Maine, the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Company ("PT"), which employ 110 BMWE members. Pet. App. 26a. When BMWE and MEC/PT were unable to reach agreement with respect to proposed changes in the wages, hours and working conditions of the BMWE

members and after the parties had exhausted the RLA's procedures for resolution of their dispute (referred to in the industry as a "major" dispute), BMWE instituted a lawful strike against MEC/PT on March 3, 1986.

Later in the month, BMWE extended the picketing to two other small railroads, the Delaware & Hudson Railroad Company ("D&H") and the Boston & Maine Corporation ("B&M"), which are owned by Guilford Transportation Industries, Inc., MEC/PT's parent company. Pet. App. 26a. Subsequently, BMWE attempted to extend its picketing beyond the corporate affiliates of MEC/PT to other eastern railroads. These railroads obtained preliminary orders enjoining such picketing.[1]

On April 8, 1986, the President of BMWE sent a telegram to the Association of American Railroads threatening to extend picketing and/or strike activity to all of the nation's railroads, including all petitioners, in an effort to "shut down the nation's railroad system." Pet. App. 5a. The purported basis for BMWE's threatened picketing was the alleged participation of the nation's railroads in a "mutual aid arrangement" designed to provide money, personnel and material assistance to the MEC/PT.[2] Consistent with its threat, on April 11, 1986,

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[1] *Consolidated Rail Corp.* v. *BMWE*, No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, No. 86-3544 (W.D. Va. April 11, 1986) (Widener J.), *vacated*, 795 F.2d 1161 (4th Cir. 1986).

[2] In response to this telegram, Association of American Railroads, on behalf of petitioners (with the exception of Burlington Northern) and other railroads, sought a temporary restraining order from the United States District Court for the District of Columbia enjoining the threatened secondary picketing by BMWE. On April 10, 1986, that court denied the motion on the ground that, in the absence of any picketing, the railroads had failed to establish a serious threat of irreparable harm. Pet. App. 31a. Union Pacific, Santa Fe, B&O, B&OCT, C&O and CSXT all voluntarily withdrew from the case pursuant to Fed. R. Civ. P. 41(a)(1)(i) and filed individual actions in the Northern District

BMWE began picketing against petitioner Union Pacific in Los Angeles, California—thousands of miles from the site of the primary dispute.

2. Petitioners operate railroads throughout the United States but, as the court of appeals found, "are strangers to the dispute between the Union and the Maine Central." Pet. App. 5a. Burlington Northern, Union Pacific and the Santa Fe all operate in the west, and each has its easternmost terminus in the Chicago area. B&O, B&OCT, C&O and CSXT operate in the east, but none of the petitioners has any connection or direct interchange of traffic with MEC or PT.[3]

Burlington Northern filed suit on April 9, 1986, in the United States District Court for the Northern District of Illinois and the same day obtained a temporary restraining order enjoining secondary picketing by respondents. The other petitioner railroads filed complaints on April 10 and also secured temporary restraining orders. The suits were consolidated for a hearing, and, on April 23, the district court issued a preliminary injunction against BMWE's picketing. Pet. App. 24a-45a.

The district court first considered the applicability of Section 1 of Norris-LaGuardia, 29 U.S.C. § 101, which generally precludes federal courts from issuing an injunction "in a case involving or growing out of a labor dispute." Relying upon *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d 1357, 1363 (8th Cir.

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of Illinois, where secondary picketing on their lines was threatened. Subsequently, the District Court for the District of Columbia declined to issue a preliminary injunction. *Brotherhood of Maintenance of Way Employes* v. *Ass'n of American R.R.*, 639 F. Supp. 220 (D.D.C.), *aff'd sub nom., Central Vermont Ry., Inc.* v. *BMWE*, 793 F.2d 1298 (D.C. Cir. 1986).

[3] B&O and C&O connect at two locations with D&H, a corporate affiliate of MEC/PT, but D&H is not a primary disputant in this case. Pet. App. 35a-36a.

1980), and *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), the district court held that, when a secondary employer seeks to have a union's activity enjoined by a federal court, the case "involves or grows out of a labor dispute" within the meaning of Norris-LaGuardia *only* when the secondary employer is " 'substantially aligned' in some material way with the railroad with which the union has its primary dispute. . . ." Pet. App. 31a. Finding that "none of the plaintiff railroads participate in any alleged 'mutual aid arrangement' with MEC/PT" (Pet. App. 27a) and that none of the petitioners directly exchanges traffic or connects with MEC/PT (*id.* at 36a),[4] the district court found that petitioners were not substantially aligned with MEC/PT.[5]

Having concluded that it had jurisdiction to enter an injunction, the district court balanced the relative severity of the harms that would befall the parties if an injunction were granted or, alternatively, were denied, and also considered petitioners' likelihood of success on the merits. Pet. App. 44a. The district court found that petitioners had satisfied their burden with respect to these issues and granted a preliminary injunction, concluding (*ibid.*):

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[4] The district court found that even the indirect interchange of traffic between MEC/PT and petitioners was *de minimis*. Pet. App. 32a-35a. Thus, in 1985, traffic originating or terminating on Guilford lines, including MEC/PT, accounted for the following percentages of the traffic carried by petitioners: Burlington Northern 0.43%; Union Pacific 0.019%; Santa Fe 0.11%; C&O/B&O less than 1%.

[5] The district court also held that the case did not "grow out of" a labor dispute because BMWE was applying pressure designed to induce petitioners to violate their common carrier obligation under the Interstate Commerce Act (49 U.S.C. § 11101(a)) to provide "safe and adequate service" without discrimination. Pet. App. 38a-40a.

> "Based upon the threatened disruption of the nation's rail service, the Court finds that the public interest weighs heavily in favor of the issuance of the preliminary injunction, which will ensure the continued interstate transportation of vital goods."

3. The court of appeals reversed. Pet. App. 1a-23a.[6] First, the court of appeals held that the RLA does not prohibit secondary picketing of any kind. Pet. App. 12a-17a. Relying heavily upon this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the court of appeals concluded that, "[u]ntil Congress acts, secondary activity is to remain unregulated." *Id.* at 17a. The court recognized that its holding would permit secondary picketing of railroads, even though a principal purpose of the RLA was to " 'avoid any interruption to commerce or to the operation of any carrier engaged therein' " (*id.* at 14a), and that such secondary picketing "has been banned in every other industry." *Id.* at 12a. Nonetheless, the court of appeals held that the RLA did not preclude secondary picketing in the railway industry because Congress' "goal" in enacting the RLA "is not itself a rule of law." *Id.* at 14a.

Second, the court of appeals held that, even if the RLA rendered secondary picketing unlawful, Norris-LaGuardia would still preclude a federal court from issuing an injunction to prevent such a violation. Pet. App. 17a-19a. The Court concluded that an injunction to enforce the RLA is permissible only to remedy violations of the negotiation and mediation processes of the Act. *Id.*[7]

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[6] Following entry of the preliminary injunction by the district court, respondents filed a petition for a writ of certiorari before judgment in this Court. No. 85-1852. After the court of appeals reversed, BMWE stipulated on June 12, 1986, to the dismissal of its petition for certiorari before judgment, and the petition was dismissed on June 16, 1986, pursuant to this Court's Rule 53.

[7] On May 16, 1986, following the commencement of secondary picketing by BMWE against Conrail, President Reagan issued Executive Order No. 12557, convening an Emergency Board under Section 10 of the RLA, 45 U.S.C. § 160. The President determined that the disputes between BMWE and MEC/PT "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." As a result, BMWE's primary and secondary picketing ceased while the Board was convened. Emergency Board No. 209 investigated the dispute and issued a report dated June 20, 1986, recommending that BMWE accept the offer made by MEC/PT prior to commencement of the strike and further that MEC/PT grant future wage increases and benefits similar to those reached in negotiations with national carriers.

The Emergency Board's recommendations did not resolve the MEC/PT-BMWE dispute, and, therefore, Congress passed a joint resolution on August 11, 1986, both establishing an advisory board to investigate the dispute and submit a report to Congress and also prohibiting any changes in the *status quo* by either party until September 19, 1986. H.J. Res. 683, 99th Cong., 2d Sess. (1986). The President signed the resolution into law on August 21, 1986. Pub. L. No. 99-385, 99th Cong., 2d Sess. (1986). The advisory board submitted its report to Congress on September 8, 1986, recommending that, in the event the parties to the dispute were still unable to reach agreement by September 13, 1986, Congress should enact legislation directing the parties to accept and apply the recommendations of Emergency Board No. 209.

On September 23, 1986, Congress adopted S.J. Res. 415, 99th Cong., 2d Sess. (1986), and on September 30, 1986, President Reagan signed it into law. Pub. L. No. 99-431. The law provides that the recommendations of Emergency Board No. 209 are binding on MEC/PT and BMWE. The passage of Pub. L. No. 99-431 does not render the instant case moot for the reasons explained by petitioners in their Supplemental Brief filed with the Court on October 2, 1986, prior to the grant of certiorari. Respondents agree that the case is not moot as a result of these developments. *See* letter of John O'B. Clarke, Jr., counsel for respondents, to Hon. Joseph F. Spaniol, Jr., October 1, 1986.

SUMMARY OF ARGUMENT

The decision of the court of appeals permits a railway union involved in a dispute with a single railroad in Maine to picket all railroads throughout the country in an effort to "shut down the nation's railroad system." Pet. App. 5a. Under the decision of the court of appeals,

the burden of respondents' dispute "with a tiny railroad in New England" will be borne not only by petitioners and all other neutral rail carriers but also by the nation's consumers of everything from food to electricity and by the many citizens dependent upon the nation's rail system for both local and intercity passenger transportation. Moreover, the conclusion of the court below—that Congress, in enacting the RLA, intended secondary activity by rail unions to be unregulated—would permit BMWE and its members to picket with impunity not only any rail carrier in the country but also shippers of all varieties of commodities that in any way use the transportation services of the primary employers. Thus, a geographically-isolated dispute between a single railroad and a mere handful of its employees could, if the court below is correct, send shockwaves through our national economy. The court of appeals' conclusion that this is what Congress intended defies common sense. And, in fact, Congress did not so intend.

1. Congress, in enacting the RLA in 1926, did not mean thereby to legitimate secondary picketing of neutral rail carriers such as petitioners, conduct which was unlawful in 1926 and had always been unlawful. Section 2 First of the RLA, for example, requires that both management and labor "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce." While the Act itself does not expressly define the permissible self-help that unions and carriers may exercise once the Act's lengthy and intricate "major dispute" resolution procedure has been finally exhausted, the structure and purpose of the RLA clearly show that Congress never intended "the law of the jungle" to prevail in rail-labor disputes. This Court recognized as much in *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966), where it restricted self-help remedies of a struck carrier in light of the overall policies of the RLA.

The structure, purpose and legislative history of the RLA make plain that Congress' overriding concern was to prevent, if at all possible, interruptions in interstate commerce in the critical rail industry. It is inconceivable that the same Congress that crafted a laborious procedure designed to avoid service interruption by requiring the primary disputants to engage in "negotiation, negotiation, and more negotiation" (Pet. App. 14a), would at the same time have intended that a rail union that has exhausted this seemingly interminable process with a single carrier would then have the absolute right to "shut down the nation's railroad system" (*id.* at 5a) by picketing wholly neutral carriers in an effort to force those carriers to violate their statutory duties under the Interstate Commerce Act.

Even if the RLA were ambiguous with respect to the legality of BMWE's secondary activities, all doubts should be resolved in petitioners' favor on the basis of the national labor policy embodied in the clear prohibition against such conduct in the National Labor Relations Act. This Court has never hesitated to turn "to the NLRA for assistance in construing the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). If the BMWE were anything but a union of railroad employees, its conduct would be in manifest violation of Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4). No logical reason exists for a different result to occur under the RLA.

2. The court of appeals also erred when it concluded that federal courts are powerless, because of the restrictions contained in the Norris-LaGuardia Act, to enjoin rail union secondary picketing, even if such conduct violates the RLA. In so ruling, the court misconstrued a long line of decisions of this Court that have recognized that the strictures of Norris-LaGuardia must be accommodated to the RLA where injunctive relief is necessary to further the RLA's purposes, policies and provisions.

3. Moreover, there is no conflict between the prohibitions in the RLA and the Norris-LaGuardia Act in the extreme circumstances presented by this case. Section 4(a) of Norris-LaGuardia prohibits injunctions only in cases growing out of a "labor dispute." Courts of appeals have correctly held that Section 4's prohibition is limited in railroad cases to injunctions against picketing of primary employers or those who are "substantially aligned" with a primary employer. *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966). It is undisputed that petitioners are not at all aligned with the primary employers in this case. Therefore, an injunction against BMWE's attempt to shut petitioners down is outside the ambit of the Norris-LaGuardia Act's prohibition and may be issued to enforce the mandates of the Interstate Commerce Act and Railway Labor Act.

ARGUMENT

I. SECONDARY PICKETING OF NEUTRAL RAIL CARRIERS BY A RAIL UNION VIOLATES THE RAILWAY LABOR ACT.

A. The Structure, Purpose And Legislative History Of The RLA Demonstrate That Congress Did Not Intend Secondary Picketing To Be Permissible Rail Union Conduct.

The central issue raised in this case is whether Congress intended to permit secondary picketing by rail unions when it enacted the Railway Labor Act of 1926.[8] The Act does not explicitly permit secondary picketing. Thus, while it is true, as the court of appeals observed (Pet. App. 13a), that "[c]ourts must abide by the legislative choice," there is no evidence that Congress *chose*

[8] Act of May 20, 1926, c.347, 69th Cong., 1st Sess., 44 Stat. 577, 45 U.S.C. 151, *et seq.*

to permit the secondary picketing threatened by BMWE. In fact, the available evidence strongly indicates that Congress chose to continue the existing prohibition of secondary picketing against railroads. The court of appeals correctly acknowledged that at the time of the RLA's enactment secondary picketing was clearly unlawful in the railroad industry. Pet. App. 13a-14a. It is incredible to assume that Congress, as a result of the Act's silence, intended in 1926 suddenly to legalize such uniformly condemned conduct. It is much more reasonable to infer, in view of the Act's purposes, that pure secondary picketing remained illegal in 1926 after Congress enacted the RLA. Indeed, in the over one-hundred year history of the railroad industry, until the decisions issued this year in connection with BMWE's secondary conduct,[9] rail unions have never been permitted by the courts to picket purely neutral rail lines.[10]

But, instead of seeking to further Congress' overall objective under the RLA of preventing interruptions of interstate commerce, the court below dismissed this objective with the observation that "this goal is not itself

[9] In addition to the decision at issue here, *see Central Vermont Ry.* v. *BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *BMWE* v. *Guilford Transportation Industries, Inc.*, —— F.2d —— (1st Cir. 1986); *Consolidated Rail Corp.* v. *BMWE*, 792 F.2d 303 (2d Cir. 1986); *Richmond, Fredericksburg & Potomac R.R.* v. *BMWE*, 795 F.2d 1161 (4th Cir. 1986); *Norfolk & W. Ry.* v. *BMWE*, 795 F.2d 1169 (4th Cir. 1986).

[10] *See, e.g., Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Consolidated Rail Corp.* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 84 Lab. Cas. (CCH) ¶ 10,923 (W.D.N.Y. 1978), *app. dism'd*, 595 F.2d 1208 (2d Cir. 1979); *Terminal R. Ass'n of St. Louis* v. *Brotherhood of Ry., Airline & Steamship Clerks*, 458 F. Supp. 100 (E.D. Mo. 1978); *Toledo, A.A. & N.M. Ry.* v. *Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *Toledo, A.A. & N.M. Ry.* v. *Pennsylvania Co.*, 54 F. 746, 753 (N.D. Ohio), *app. dism'd sub nom., In re Lennon*, 150 U.S. 393 (1893); *Thomas* v. *Cincinnati, N.O. & T.P. Ry.*, 62 F. 803 (S.D. Ohio 1894).

a rule of law." Pet. App. 14a. This assertion conflicts directly with the well-established principle of statutory construction that requires the judiciary to attempt to discern congressional purpose in interpreting any statute and, more important, a long line of decisions from this Court that have looked to the RLA's underlying purposes and policies in formulating specific rules of conduct for rail unions and carriers.

The RLA was the culmination of nearly forty years of federal legislative efforts to create a railway labor law to minimize interruptions in interstate commerce. The roots of these efforts began with enactment of the Interstate Commerce Act in 1887, which created a fundamental common carrier obligation requiring railroads to provide "transportation or service on reasonable request." See 49 U.S.C. § 1(4), recodified as 49 U.S.C. § 11101(a). This common carrier "duty runs not to shippers alone but to the public . . . [The carrier] owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies . . ." *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 245 (1966). Consistent with its creation of this fundamental common carrier obligation, Congress sought to develop mechanisms that would effectively resolve labor-management disputes with the least disruption to vital transportation services, beginning with the enactment of the Arbitration Act of 1888.[11]

The RLA was passed in 1926 and amended in 1934 to provide a comprehensive framework for the resolution of labor disputes in the railroad industry because of the vital importance of that industry to the commerce

[11] *See generally*, Rehmus, "Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries," in National Mediation Board, *The Railway Labor Act at Fifty* (1976); Lecht, *Experience Under Railway Labor Legislation* 5 (1955).

of the whole nation. When it considered the RLA, Congress was well aware of the obligations it had placed on rail carriers under the Interstate Commerce Act and of the danger that union picketing activities might interfere with those obligations.[12] The fundamental premise of the RLA is that disputes will be settled by agreement, without any disruption in commerce, and that agreements will be maintained. This premise is embodied in RLA Section 2 First, 45 U.S.C. § 152 First (emphasis added), which provides:

> "It shall be the duty of all carriers, their officers, agents, and employees to *exert every reasonable effort* to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The duty to "exert every reasonable effort to make and maintain agreements" is not merely precatory. It is legally enforceable and applies even after carriers and employees have exhausted the processes of the RLA. See

[12] During the Congressional hearings both labor and railroad spokesmen were asked whether the proposed bill would legalize union efforts to interrupt interstate commerce. Mr. Richberg replied for the unions: "Now, it certainly is the law today that it is unlawful to conspire to interrupt interstate commerce . . . . We do not need to write it in to any law to make it unlawful . . . ." Hearings on S.2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. 88 (1926). Colonel Thom echoed these observations as spokesman for the railroads: "[T]here is nothing in this bill to prevent the use of an injunction to prevent a conspiracy to interrupt transportation." *Id.* at 26. Because the RLA resulted from an agreement between management and labor, this Court has recognized that "the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 576 (1971).

Brotherhood of Railway and Steamship Clerks v. *Florida East Coast Ry.*, 384 U.S. 238 (1966) (carrier required to maintain agreements even after onset of strike; only changes within scope of negotiation and any others reasonably necessary to continue operations during strike may be made); *Chicage & N. W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971) (RLA provides authority for injunction against strike on showing employees had failed to "exert every reasonable effort" even after exhaustion of statutory processes).[13]

The RLA itself makes plain that it was passed "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151(a). It has always been understood that the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N. O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930). See also *Virginia Ry.* v. *System Federation No. 40*, 300 U.S. 515, 547 (1937) ("major objective [of RLA] is the avoidance of industrial strife"); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 199-200 (1944); *California* v. *Taylor*, 353 U.S. 553, 566 (1957); *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 148 (1969) (RLA passed "in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce").

This dominant concern is amply demonstrated by the statute's legislative history, which contains repeated references to Congress' intent to minimize interruptions to interstate commerce.[14] Congress was particularly concerned that small, localized disputes not be permitted to spread into a nationwide rail shutdown because of the disastrous effects on the public health and welfare such strikes would cause.[15] The suffering that could result from a nationwide rail strike was described in vivid terms by one congressman:

> "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week the suffering and death resulting therefrom would be a national calamity."

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, As Amended (1926 Through 1966)* 238 (1974) (remarks of Rep. Merritt) (hereinafter referred to as "RLA Legislative History").[16] As a result of these concerns, the primary goal of the Act was "to insure to the public continuity and efficiency of

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[13] In *Chicago & N.W.*, 402 U.S. at 578, this Court emphasized that the duty created by Section 2 First is "central to the effective working of the Railway Labor Act."

[14] *See NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 179 (1967) ("labor legislation is peculiarly the product of legislative compromise of strongly held views . . . and [thus] legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question).

[15] Thus, the labor spokesman explained during the hearings on the RLA that one of the features of the proposed bill that was a major improvement over the prior law was that the proposed National Mediation Board, unlike the Railway Labor Board, its predecessor, would deal with disputes on a local, rather than national, level and that, consequently, "trouble" would not spread. Hearings on H.R. 9463 before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 88 (1926) (hereinafter referred to as "House RLA Hearings").

[16] Representative Robison similarly described the effects of the 1922 nationwide shopmen's strike against the railroads:

> "The black shadow which fell across the economic and industrial life of the Nation is still fresh in our minds. Business was stagnant; industry was paralyzed; the health and life of whole communities were threatened. We can in part visualize in a measure what would have been the conditions if there had been a general strike of all the railroad workers." RLA Legislative History at 386.

interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies." H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926); see House RLA Hearings at 11 (Statement of D. Richberg); *id.* at 115 (Statement of A. Thom).

In furtherance of this legislative purpose, Congress carefully crafted elaborate procedures designed to "provide for the prompt and orderly settlement of *all* disputes concerning rates of pay, rules or working conditions" and "*all* disputes growing out of grievances or out of the interpretation or application of [collective bargaining] agreements," 45 U.S.C. § 151a(4) and (5) (emphasis added)—the entire universe of railway labor controversies. These have been categorized into "major" and "minor" disputes. See *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-28 (1945).

Day-to-day grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements—so-called "minor disputes"—must be resolved through the National Railroad Adjustment Board (RLA Section 3 First, 45 U.S.C. § 153 First (i)) or special arbitration boards established by agreement of the parties. RLA Section 3 Second, 45 U.S.C. § 153 Second. These procedures are compulsory, not optional with the parties, and a strike to enforce grievance demands is a violation of the Act that can be enjoined by the federal courts, notwithstanding the strictures of the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 34-35 (1957). See *Brotherhood of Locomotive Eng'rs* v. *Louisville & N. R.R.*, 373 U.S. 33, 41-42 (1963).

The RLA also establishes an elaborate, extended procedure for resolving so-called "major disputes," disagreements that arise between rail unions and management over the formation of new collective agreements or over efforts to change existing agreements. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. at 723. The Act provides for negotiation, mediation by the National Mediation Board, voluntary arbitration of the dispute and, if the dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the appointment of an emergency board by the President to investigate and report on the dispute. The Act requires the parties to maintain the *status quo* throughout the lengthy process until 30 days after the emergency board has made its report to the President. See RLA §§ 2 Second, 5 First, 6, 7, 10; 45 U.S.C. §§ 152 Second, 155 First, 156, 157, 160.[17] See generally *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 378.

Only at the conclusion of this lengthy major dispute resolution process, if the parties have been unable to reach an agreement, does the Act allow a rail union to strike the carrier with which it has the dispute in order to attempt to force an accommodation and to reach an agreement. See *Brotherhood of Locomotive Eng'rs* v. *Baltimore & Ohio R.R.*, 372 U.S. 284, 291 (1963). The RLA itself is silent with respect to the rights of rail unions to engage in any form of self help, including the right to strike. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

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[17] The court of appeals described the process as requiring "negotiation, negotiation, and more negotiation." Pet. App. 14a. This Court has observed that "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966). *See also Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. at 149 (describing major dispute resolution scheme as "an almost interminable process").

See generally, Newborn, *Restrictions on the Right to Strike on the Railroads: A History and an Analysis (I)*, 24 Lab. L. J. 142, 147-148 (1973). However, because Congress rejected the imposition of compulsory arbitration on the parties to force a resolution of major disputes, the Court has construed the Act as allowing strikes in those limited circumstances. See *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 244 (1966); *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 384 (1969); *Texas & N. O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. at 566, n.3.[18]

Notwithstanding the fundamental purpose of the RLA to provide machinery for the settlement of "all disputes" in order to prevent interruptions of interstate commerce, the court of appeals found that Congress intended no limitation whatsoever on the picketing activities of a rail union once the major dispute resolution process has run its course.

The instant case illustrates the incongruity created by the court's decision. BMWE initially issued a threat to picket all of the nation's railroads because, it claimed, MEC/PT were receiving financial aid and assistance from other carriers. But even after it became apparent that

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[18] The requirement that the parties to a major dispute observe the *status quo* while the major dispute provisions of the RLA are being exhausted permits an inference that Congress intended to permit a resort to self-help by those parties as to each other once the procedures have been exhausted without resolving the dispute. But, those *status quo* provisions also support an interpretation that Congress did not intend to allow secondary picketing of a carrier not a party to the dispute. This is because the *status quo* obligations in terms are applicable only to the parties to the major dispute. The inference of a right to resort to self-help once the *status quo* ceases to apply is therefore restricted to self-help between the parties to the dispute.

there was no mutual assistance pact,[19] BMWE announced that it would picket any carrier that carried any shipments destined for or originating on the primary disputants. BMWE asserted that it had a right to picket, no matter how geographically remote from the primary dispute, in order to force carriers to refuse to handle MEC/PT traffic.[20] As the court of appeals correctly inferred, BMWE's real goal was to "shut down the nation's railroad system" (Pet. App. 5a), thereby creating a national transportation emergency that would either force MEC/PT to give in to its bargaining demands or force the Congress to intercede and impose a legislative solution to the dispute.

There are an estimated 1,000 railroad agreements involved in local negotiations during any given year.[21] Yet, BMWE would have this Court find that Congress, which was expressly concerned in 1926 with the potentially devastating effects of a nationwide rail strike, nonetheless intended to permit the rail unions involved in each one of these 1,000 local disputes to ignite a nationwide conflagration in order to bring both the primary disputant and the nation's rail transportation system to their knees.[22] They do this for the sole purpose of in-

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[19] As the district court found, undisputed testimony showed that no such mutual aid arrangement existed between petitioners and MEC/PT. Pet. App. 27a.

[20] As discussed at page 28, below, BMWE's secondary picketing sought to force neutral carriers to violate their statutory obligations under the Interstate Commerce Act to handle all property tendered traffic without discrimination.

[21] Rehmus, "The First Fifty Years—and then?" in National Mediation Board, *The Railway Labor Act at Fifty*, 246 (1976).

[22] The devastating ramifications of the decision below applies not only in the rail but also in the airline industry. Congress amended the RLA in 1936 to bring air carriers engaged in interstate and foreign commerce within the Act's scope. Act of April 10, 1936, c. 166, Pub. L. No. 74-487, 49 Stat. 1189. Thus, if sec-

creasing their negotiating leverage with entities (i.e., the primary employer and Congress) other than the victims of their picketing.

In view of the overriding purposes of the Act to minimize disruptions to interstate commerce, the burden should be on those asserting the existence of secondary picketing rights to show that Congress in some fashion expressed its support for the right of a rail union to expand the impact of a dispute beyond the primary carrier. Yet, neither BMWE nor the court of appeals has cited a shred of legislative history to support the far-reaching conclusion that Congress intended to permit the use of secondary picketing in the railroad industry.

The reasonableness of requiring BMWE to show that Congress expressly intended to allow secondary picketing is supported by the undisputed fact that, at the time of the RLA's passage, Congress understood that secondary pressure tactics in the rail industry had uniformly been declared unlawful by the courts under the common law of conspiracy as well as under the statutes protecting the free flow of interstate commerce and the U.S. mail. The court of appeals acknowledged that "[n]o doubt th[e] law [in force in 1926] forbade secondary picketing." Pet. App. 13a.[23] BMWE cannot, however, satisfy its burden to show that Congress intended to legalize secondary activities because the structure, purpose and legislative history of the RLA demonstrate that Congress was fully aware of the illegality of secondary activity

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ondary picketing by rail unions is permissible under the RLA, similar conduct by airline employees is also lawful.

[23] *See, e.g., Toledo, A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *Toledo, A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 746, 753 (N.D. Ohio), *app. dism'd sub nom., In re Lennon*, 150 U.S. 393 (1893); *Thomas* v. *Cincinnati, N.O. & T. P. Ry.*, 62 F. 803 (S.D. Ohio 1894); *Southern Cal. Ry.* v. *Rutherford*, 62 F. 796, 797 (S.D. Cal. 1894); *United States* v. *Debs*, 64 F. 724 (N.D. Ill. 1894), *pet. for writ of habeas corpus denied sub nom., In re Debs*, 158 U.S. 564 (1895).

in the railroad industry, and that Congress intended the RLA not to change this prohibition.[24] Contrary to the conclusion of the court of appeals, Congress' failure to insert an express prohibition of secondary picketing in the RLA is *no* evidence of Congress' intent suddenly to authorize such conduct under the RLA. The fact is that Congress did not expressly legitimate the secondary boycott as a weapon that rail labor could permissibly use in the limited circumstance where self-help was authorized under the RLA. Accordingly, Congress did not intend to authorize rail labor to settle its primary disputes through secondary picketing.[25]

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[24] For example, Congressman Fredericks asked the labor spokesman whether the proposed bill set aside or nullified the volume of statutory and decisional law that had developed with respect to labor relations on the railroads. Richberg responded:

> "I do not believe that there is any provision of either statutory law or law written in the courts which this bill nullifies in any way. Now, I am quite sure that it does not in any way disturb the general law regarding industrial relations, ...
> "So that I believe I am quite safe in saying that it does not alter either the statute law or the law written in the courts in any way that is not perfectly apparent upon the face of it as I have indicated." House RLA Hearings at 41-42.

See also id. at 90.

[25] As one commentator, himself a rail union attorney (*see Ranieri* v. *United Transportation Union*, 743 F.2d 598 (7th Cir. 1984)), has observed:

> "The Railway Labor Act said nothing specific about secondary boycotts. It neither singled them out for proscription nor protection. The Act did grant to employees 'the right to organize and bargain collectively . . .' and guaranteed employees the right not to be required to perform services without consent. It seems unlikely, however, that by these provisions or any others of the Act, Congress can fairly be read to have intended, in 1926, to have legalized the secondary boycott, then deemed unlawful under the Interstate Commerce Act or the anti-trust laws." Newborn, *Restrictions on the Right to Strike on the Railroads: A History and Analysis (II)*, 24 Lab. L.J. 234, 248 (1973) (footnotes omitted).

The contrary view adopted by the court of appeals leads to absurdities. It means that the single industry in which Congress was most concerned about strikes is the *only* one in which secondary picketing is allowed. It also means that Congress insisted on elaborate procedures to ensure bargaining over the parties' demands before there can be a strike (and consequent interruption of rail service) arising out of a dispute between a carrier and its employees, but that, once such procedures have been exhausted unsuccessfully with one carrier, the union has *carte blanche* immediately to strike or picket all other carriers, not parties to the dispute (or to the negotiations, mediation and conciliation that accompanied it). Finally, it means that secondary picketing can shut down the nation's entire rail system whenever a local single-carrier dispute is not successfully resolved under the statute's procedures, even though exhaustion of those detailed procedures is absolutely required before even a local shutdown can occur. The notion that Congress intended anything of the kind is unsupportable, particularly since the secondary carrier is powerless to reach agreement with the union concerning the subject of the primary dispute over terms or conditions of employment.[26]

B. The Court Of Appeals Erred In Ignoring The Structure And Purpose Of The Act In Deciding Whether The RLA Prohibits Secondary Picketing.

The court of appeals rejected any analysis of the general purposes of the RLA on the grounds that such an effort "confuses the anticipated effects of the statute with the rules the statute establishes," (Pet. App. 14a), and that the "Railway Labor Act is a statute establishing rules, not a statute establishing goals and calling on the

[26] Moreover, the secondary carrier cannot accede to the union's demand that all traffic bound to the struck primary carrier be stopped without committing a violation of the duties imposed on it by the Interstate Commerce Act. *See* pp. 28-29, *infra*.

judiciary to create the rules." *Id.* at 15a. The court of appeals observed that, based on petitioners' argument, "between 1932 and 1947" railroads would have been "the only industry protected against this practice [secondary picketing]." The court could not imagine that Congress could have intended such a result. Pet. App. 12a.

The court of appeals' refusal to acknowledge that Congress may have intended the railroads to enjoy protections against union picketing not conferred on other industries until the enactment of the Taft-Hartley Act, 29 U.S.C. §§ 154 et seq. (1947) ignores the very special position the rail industry and railway labor legislation have historically enjoyed in this country because of the national interest in the uninterrupted flow of interstate commerce.

> "Of equal or greater significance as a reason for special railroad labor legislation is an historic and pervasive belief that the national welfare necessitates uninterrupted railroad service. This belief has long dominated congressional action in the field of railroad labor legislation."

Rehmus, "Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries" in National Mediation Board, *The Railway Labor Act at Fifty*, (1976), *supra*, 15. Thus, Congress first enacted comprehensive labor legislation (the Arbitration Act of 1888) for the rail industry almost 50 years before the passage of the National Labor Relations Act. In addition, because of concerns for the possible interruption of interstate commerce, Congress imposed compulsory arbitration to resolve "minor" disputes or grievances on the railroads but has never done so in other industries. Finally, the elaborate "major" dispute resolution process with its mandatory *status quo* provisions is unparalleled outside the rail industry.

Therefore, it is not at all anomalous that Congress, given its sensitivity to the special problems of rail strikes,

would have given that industry between 1932 and 1947 a protection against secondary picketing enjoyed by no other industry.[27] The anomaly that cannot be accepted is the one created by the court of appeals: that after 1947 Congress would have left the nation's most strike-sensitive industry as the only one unprotected from the acknowledged ravages of secondary picketing.

The court of appeals' refusal to assess the legality of secondary picketing based on the fundamental purposes and policies of the RLA is inconsistent with both the understanding of Congress concerning the judiciary's proper function in fleshing out the Act's provisions and a long line of decisions from this Court that have looked to the purposes and policies of the Act in formulating specific rules of conduct for rail unions and carriers alike.

The lack of specifically-enumerated enforceable duties in the proposed RLA was a matter of concern during the congressional hearings. Congressman Garber, in particular, asked labor's spokesman whether such duties ought not be made more explicit. The labor spokesman responded that the representatives of labor and management who had prepared the draft bill had not intended to write an all-inclusive codification of permissible and prohibited conduct, but instead had specifically intended

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[27] It is significant that, during the period between the passage of Norris-LaGuardia in 1932 and Taft-Hartley in 1947, petitioners have been unable to locate any reported decisions in which rail unions engaged in any secondary picketing. By contrast, industrial unions used this self-help remedy repeatedly until prohibited by the passage of Taft-Hartley. *See, e.g., Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 F.2d 931 (10th Cir.), *cert. denied*, 317 U.S. 645 (1942); *Taxi-Cab Drivers Local Union No. 889 of Oklahoma City* v. *Yellow Cab Operating Co.*, 123 F.2d 262 (10th Cir. 1941); *Amalgamated Ass'n of Street, Electric Ry. & Motorcoach Employees* v. *Dixie Motor Coach Corp.*, 170 F.2d 902, 905 (8th Cir. 1948).

that the Act would take shape by means of judicial interpretation based on its general purposes:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

House RLA Hearings at 91. The RLA passed Congress without any significant alteration or attempt to specify further the respective duties of the railroads and unions. This Court relied upon this "common law" explanation in *Chicago & N. W. Ry. Co.* v. *United Transportation Union*, 402 U.S. at 576-77, where the Court concluded that RLA Section 2 First created an enforceable legal obligation to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, despite the absence of specific words defining reasonable efforts in the Act.

This Court has repeatedly filled in the interstices in the RLA by looking to the policies and purposes of its drafters in order to discern the rights, duties and obligations Congress intended to create. In *Steele* v. *Louisville & N. R.R.*, 323 U.S. at 202-203, for example, this Court looked to "the purpose of the Act" and created therefrom an enforceable duty of fair representation. Similarly, in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 213 (1944), this Court described the right of a union member to be free from discrimination by his union as a "federal right implied from the statute and the policy which it has adopted." This Court also determined the right of a rail union to settle a member's grievance "by implication from the pertinent provi-

sions" of the RLA because the statute itself was silent. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. at 729.[28]

Most important, however, this Court has previously undertaken the task of defining the legitimate self-help available to railroads and labor in the event of a lawful strike based on this Court's interpretation of Congress' overriding legislative purpose. For example, in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. at 247, the Court invoked "the spirit of the Railway Labor Act" in carefully delimiting the extent of self-help available to a struck carrier so as to prevent "labor-management relations [from] revert[ing] to the jungle." [29]

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[28] This Court has also analyzed Congress' intentions in cases involving the mechanisms for resolving primary disputes under the RLA where the Act's language provided little guidance. In *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 244 (1950), the Court held the jurisdiction of the National Railroad Adjustment Board to be exclusive based on the Court's reading of Congress' intent. *See also Union Pacific R.R.* v. *Price*, 360 U.S. 601, 608-09 (1959). In *Order of Railway Conductors of America* v. *Pitney*, 326 U.S. 561 (1946), and *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157 (1966), this Court inferred a legislative intent that jurisdictional disputes be resolved through the Adjustment Board in tripartite proceedings. *See also California* v. *Taylor*, 353 U.S. 553 (1957) (Court looked to policies of RLA to determine coverage of state-owned railroads in view of Congressional silence); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) (Court looked to purposes of RLA to determine whether punitive damages are available in suit against rail union in view of Congress' silence).

[29] In *Florida East Coast*, this Court concluded that a struck carrier is permitted to depart from the terms and conditions of the collective bargaining agreement without first exhausting the Act's lengthy major dispute resolution procedures in view of the carrier's right of self-help and its duty under the Interstate Commerce Act to operate to serve the public. Nonetheless, this Court ruled that "any power to change or revise the basic collective agreement must be closely confined and supervised" and must be "truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation." 384 U.S. at 246, 248.

In the final analysis, the question whether Congress intended to prohibit secondary boycotts under the RLA must be answered against the background of the legislative history of the RLA and subsequent legislation and the historical context from which the RLA arose. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 620 & n.5 (1967); *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534, 534-44 (1940). The court of appeals ignored these sources based on an apparent misplaced desire to demonstrate judicial restraint. In so doing, the court failed to fulfill its judicial function and, as a result, authorized "an end completely at variance with the purpose of the statute" and extended the union's right of picketing to limits never before recognized. *United States* v. *Public Utilities Comm'n of California*, 345 U.S. 295, 315 (1953). See *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201-02 (1979); *Johansen* v. *United States*, 343 U.S. 427, 431 (1952); *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

The purposes underlying the RLA are clear; it is the duty of this Court to reason from those purposes and to declare definitively that Congress did not intend to allow unions such as BMWE free rein to effect stoppages of interstate commerce anywhere in the nation in support of a primary strike.[30]

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[30] As this Court observed in *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941), quoting from Justice Holmes' opinion for the circuit court in *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908):

> "The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty

C. Congress Did Not Intend To Authorize Secondary Picketing In The RLA Because The Purpose Of Such Conduct Is To Induce Neutral Carriers To Violate Their Duties Under The Interstate Commerce Act.

As the court of appeals acknowledged, at least one of the purposes of BMWE's threatened secondary picketing of petitioners and other neutral carriers was to induce those railroads to cease handling shipments bound to or from MEC/PT so as to "dry up the Guilford lines' source of traffic" in an effort to force MEC/PT to accede to the union's demands. Pet. App. 5a. Thus, BMWE sought to pressure neutral railroads to stop interchanging traffic with MEC/PT[31] or handling interline freight also handled by the primary employers. It would be incongruous to hold that Congress, in enacting the RLA in 1926, intended to authorize such conduct when Congress had already made it unlawful for a carrier to refuse to handle interline freight tendered to it under the Interstate Commerce Act ("ICA").

The ICA requires railroads to provide "transportation or service on reasonable request," 49 U.S.C. § 11101(a), including interchange of freight with connecting lines, *id.* § 10742, and prohibits discrimination in the provision of service. *Id.* § 10741. In *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. at 245, this Court emphasized the importance of the duties imposed by that Act:

> "The duty runs not to shippers alone but to the public. In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed."

for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

[31] None of petitioners herein directly connects or interchanges traffic with MEC/PT. Pet. App. 32a-35a.

Accordingly, it has been held that a carrier may be liable in damages for a breach of its ICA duties, notwithstanding the existence of a labor dispute at the time. See *Ashley, Drew & N. Ry.* v. *United Transportation Union*, 625 F.2d at 1370 (and cases cited therein); *Lakefront Dock & Railroad Terminal Co.* v. *International Longshoremen's Ass'n*, 333 F.2d 549, 552 (6th Cir. 1962).

Just as struck primary carriers have a legal duty to try to continue to operate, as the *Florida East Coast* decision held, the ICA requires secondary carriers to continue to render service to struck carriers and shippers. See *Ashley, Drew, supra*, 625 F.2d at 1370; *Montgomery Ward & Co., Inc.* v. *Northern Pacific Terminal Co. of Oregon*, 128 F. Supp. 475, 494-95 (D. Or. 1953); *Toledo, A. A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 746 (N.D. Ohio), *app. dism'd sub. nom., In re Lennon*, 150 U.S. 393 (1893). It follows that union conduct, such as secondary picketing, that seeks to force a carrier to violate its statutory duties would also violate the ICA. See, e.g., *Ashley, Drew, supra*, 625 F.2d at 1370; *Brotherhood of Railroad Trainmen* v. *New York Cent. R.R.*, 246 F.2d 114, 120-21 (6th Cir. 1957); *Chicago & Ill. M. Ry.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771, 774 (7th Cir.), *vacated as moot*, 375 U.S. 18 (1963).

In sum, Congress' manifest concern with the uninterrupted flow of interstate commerce further undercuts any suggestion that Congress could have implicitly intended in passing the RLA to permit the disruptive secondary activities threatened by BMWE here.

D. The RLA Should Be Construed Consistently With The National Labor Relations Act To Prohibit The BMWE's Threatened Secondary Picketing.

For the reasons stated, petitioners believe that the structure and purpose of the RLA (and the ICA) convincingly indicate that Congress did not intend to permit

secondary picketing by rail unions. But any doubt on that issue can be readily dispelled by reference to the national labor policy concerning secondary picketing embodied in the National Labor Relations Act, 29 U.S.C. 151 *et seq.*

This Court and others have previously held that, when the RLA does not clearly provide an answer to a railway labor problem, it is appropriate to turn "to the NLRA for assistance in construing the Railway Labor Act . . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 383. See *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 200-201 (1944) (exclusive representation and duty of fair representation); *Brotherhood of Railroad Trainmen Enterprise Lodge, No. 27* v. *Toledo, P&W R.R.*, 321 U.S. 50, 61 n.18 (1944) (good faith bargaining); *Robinson* v. *Pan American World Airways, Inc.*, 777 F.2d 84, 88 (2d Cir. 1985) ("Historically, courts and administrative agencies have looked to the NLRA and caselaw under it for guidance in interpreting questions arising under the RLA"). This is not to say that requirements in the NLRA should be imported wholesale into the RLA,[32] but it would be anomalous to permit union or employer activities under the RLA, which would clearly violate national labor policy as

[32] If anything, the differences in the two labor laws strongly support applying the ban on secondary picketing in the NLRA more broadly in cases arising under the RLA. As Judge Wisdom explained:

> "[T]he Railway Labor Act is more concerned than the National Labor Relations Act with continuance of the employer's operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA, it is only the first step under the Railway Labor Act . . . ."

United Industrial Workers of Seafarers International Union v. *Board of Trustees of Galveston Wharves*, 400 F.2d 320, 329-330 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969); *National Airlines, Inc.* v. *International Ass'n of Machinists and Aerospace Workers*, 416 F.2d 998, 1004 (5th Cir. 1969), *cert. denied*, 400 U.S. 992 (1971).

provided in other Acts. Accordingly, in analyzing the legality of a union's secondary activities under the RLA, it is appropriate for the Court to "refer to the NLRA's policies . . . to determine . . . whether [the union's conduct] is beyond the pale of any activity thought permissible." *Jacksonville Terminal Co.*, 394 U.S. at 384.

There is no question that Congress has emphatically condemned and outlawed secondary picketing such as that threatened by the BMWE in this case. A focal point of the Congressional debates that led to passage of the Taft-Hartley Act[33] was the uniform condemnation by senators and representatives of secondary picketing activities and secondary boycotts. Representative Landis' comments were typical:

> "No one should condone jurisdictional disputes, wildcat strikes, *secondary boycotts*, and violence and destruction of property . . . .
>
> "Secondary boycotts engaged in by labor unions to force a third party, not a party to a primary labor dispute, to force that party to cease using the products of the employer engaged in the primary dispute is an activity which should be made illegal. Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of the deliveries of milk, bread, meat, fruits, vegetables, and other essentials of life." 93 Cong. Rec. A1296 (1947) (emphasis added).[34]

[33] Act of June 23, 1947, c. 120 § 1, 80th Cong., 1st Sess., 61 Stat. 136, codified at 29 U.S.C. §§ 141, *et seq.*

[34] Senator Taft, one of the Act's namesakes, spoke of the Senate Labor Committee's determination to outlaw the secondary boycott:

> "I think the committee all agreed that those types of strikes [*e.g.*, the secondary boycott] are in effect racketeering strikes. They are strikes which are not direct strikes to settle questions of wages or hours or better working conditions. They are strikes which are, in effect, attempts to bring indirect pres-

Consequently, in the Taft-Hartley Act, Congress amended the NLRA to include Section 8(b)(4), 29 U.S.C. § 158 (b)(4), making most secondary picketing by industrial unions an unfair labor practice.

Congress' purpose in passing Taft-Hartley was clear: to declare as national labor policy the illegality of secondary picketing and the secondary boycott as labor weapons.[35] As this Court explained in *Local 1976, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 357 U.S. 93, 100 (1958):

> "[Congress] aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees

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> sure on third parties, to get third parties to work in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power." 93d Cong., Rec. 3954 (1947).

Senator Taft described the breadth of the prohibition under consideration:

> "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 Cong. Rec. 4323 (1947).

[35] Section 8(b)(4) of the NLRA, as added by Taft-Hartley, is not directly applicable to secondary activities of rail labor unions. Section 8(b)(4) prohibits secondary activities only of a "labor organization," which is defined in Section 2(5) of the Act as an organization of "employees." "Employee" is defined in section 2(3) of the Act as excluding "any individual employed by an employer subject to the Railway Labor Act." NLRA § 2(5), (3); 29 U.S.C. § 152(5), (3).

> to engage in strikes or concerted refusals to handle goods."

Thus, picketing around the site of a secondary employer's business solely for the purpose of inducing it to cease doing business with the primary employer is plainly illegal secondary activity under Section 8(b)(4). See, e.g., *Local 761, International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 675 (1961); *Wadsworth Building Co.*, 81 N.L.R.B. 802, 805.

In 1959, Congress further tightened its prohibition of secondary activities by amending the NLRA. Congress at that time resolved the issue of whether Section 8(b)(4) as enacted in 1947 expressly prohibited such secondary picketing of *rail* employers by *non-rail* unions in furtherance of their primary disputes with *non-rail* employers. Because Section 8(b)(4) as enacted in Taft-Hartley outlawed only secondary pressures directed against "any employer," defined to exclude "any person subject to the Railway Labor Act,"[36] a split of authority had developed concerning the lawfulness of such secondary picketing under the NLRA.[37] Congress resolved this dispute by further amending the NLRA in the Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (Landrum-Griffin Act[38] to make it unlawful for an NRLA union to engage in secondary activities against "any *individual* employed by any *person* engaged in commerce or in an industry affecing commerce." 29 U.S.C. § 158(m)(4) (emphasis added). One of the express reasons for this change was to reaffirm Congress' intent that the nation's railroads be free from the fear of secondary pressures

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[36] NLRA Section 2(2); 29 U.S.C. § 152(2).

[37] *See, e.g., Int'l Rice Milling Co., Inc.* v. *NLRB*, 183 F.2d 21, 24-25 (5th Cir. 1950), *rev'd in part on other grounds*, 341 U.S. 665 (1951).

[38] Act of September 14, 1959, Pub. L. No. 86-257, 86th Cong., 1st Sess., 73 Stat. 519.

from *any* source. See *United Steelworkers* v. *NLRB*, 376 U.S. 492, 501 (1964).

The legislative history of Landrum-Griffin is replete with references to the desire of President Eisenhower and the Congress to stamp out once and for all secondary pressure tactics.[39] Congress viewed the LMRDA as effectuating its intent in passing Taft-Hartley twelve years earlier:

> "We all know that Congress intended to outlaw secondary boycotts in 1947. For a variety of reasons the attempt was not successful." Remarks of Senator Curtis, 105 Cong. Rec. 16423 (1959); II LMRDA Legislative History at 1441.

In fact, in condemning the use of secondary picketing directed *at* the nation's railroads, Congress confirmed that the use of such secondary tactics *by* rail union members was equally contrary to national labor policy. S. Rep. No. 187, 86th Cong., 1st Sess. 78, 80 (1959); I LMRDA Legislative History at 476. Congress' vehement condemnation of the use of secondary pressures by industrial unions directed against all industries, *including rail transportation*, demonstrates clearly that national labor policy forbids secondary picketing.

For the foregoing reasons, the issue in this case cannot and should not be isolated from the totality of national labor laws and policy, of whose overall fabric the RLA is an inseparable part. Thus, even if the RLA itself does not supply a complete answer to the issue of the legality of BMWE's activities, Congress' intent to prohibit BMWE's secondary picketing could not be clearer.

[39] President Eisenhower's January 28, 1959 Message to Congress on Proposed Labor-Management Legislation called on Congress to enact legislation "[t]o protect the public and innocent third parties from unfair and coercive practices, such as boycotting and blackmail picketing." S. Doc. No. 10, 86th Cong., 1st Sess. at 1 (1959), *reprinted in* I National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 80 (1959) (hereinafter referred to as "LMRDA Legislative History"). *See also* S. Rep. No. 187, 86th Cong., 1st Sess., at 78 (1959); LMRDA Legislative History at 474 (statement of Sen. Kennedy); 105 Cong. Rec. 14195 (1959); II LMRDA Legislative History at 1568 (remarks of Rep. Griffin).

E. Nothing In *Jacksonville Terminal* Requires The Court To Hold That Purely Secondary Picketing Is Lawful Under The RLA.

The court of appeals based its conclusion that the RLA does not prohibit secondary picketing largely on this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*. Pet. App. 15a-17a.[40] A proper reading of that decision demonstrates that the Court carefully avoided ruling on the legality of secondary picketing under the RLA because such a ruling was not necessary to resolve the narrow issue before the Court: *viz*, should state courts be permitted to apply

[40] *Jacksonville Terminal* was not the first case to bring to this Court the issue of secondary picketing by rail unions of rail carriers. Three years earlier, this Court reviewed the Fifth Circuit's decision in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966). At issue there was the power of a federal court under Norris-LaGuardia to enjoin picketing of the Jacksonville Terminal Company by employees of the struck Florida East Coast Railway ("FEC"). FEC was a one-fourth owner of Jacksonville Terminal Company and that Company provided services to FEC that were found by the Fifth Circuit to be "an integral part of the day-to-day operations of the FEC." 362 F.2d at 651. A divided court of appeals held that the union's picketing could not be enjoined. 362 F.2d at 654-655.

The Fifth Circuit's judgment was affirmed by an equally divided Supreme Court. 385 U.S. 20 (1966). Thus, four of the eight voting Justices would have reversed the court of appeals' judgment and would have granted an injunction against the picketing of a carrier whose position was closely related to the primary disputant, FEC. The close division of opinion on that issue explains the equivocal manner in which the Court in *Jacksonville Terminal* treated the RLA issue in deciding the narrow pre-emption question presented there.

state law in prohibiting self-help activities by rail labor unions.[41]

In *Jacksonville Terminal*, this Court reviewed the decision of the Florida District Court of Appeal, which had enjoined a union's picketing of Jacksonville Terminal Company under the state's restraint of trade and transportation laws. In a 4-3 decision, this Court vacated the Florida court's injunction on the ground that federal law preempted the state court's application of state law to determine the legality of the picketing. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

This Court was careful to point out the peculiar facts presented to it. Thus, early in the opinion the Court noted that the picketing was not of a truly neutral employer:

> "Petitioners, who represent FEC's operating employees, responded by calling a strike and thereafter by picketing the various locations at which *FEC* carried on *its* operations, including the premises of the respondent, Jacksonville Terminal Company." 394 U.S. at 371 (emphasis added).

The Court observed that FEC carried on "substantial daily operations at the terminal" and that the Terminal Company provided "various services necessary to FEC's operations." *Id.* at 373. It expressly adopted the finding of the Fifth Circuit in *Atlantic Coast Line* that "'the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC . . . .'" *Ibid.* (emphasis in original). This Court recognized that the case involved picketing at a "common situs." *Id.* at 388-389.

The Court carefully defined the narrow issue presented to it. "We are presented . . . with the problem of de-

[41] As this Court explained, "We granted certiorari . . . to determine the extent of *state* power to regulate the economic combat of parties subject to the Railway Labor Act." 394 U.S. at 372 (emphasis added).

lineating the area of labor combat protected against infringement *by the States*." *Id.* at 382 (emphasis added). In determining whether the union's picketing activities could be regulated by the states, it was necessary "only to determine whether [the union's conduct] is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible." *Id.* at 384.[42] Thus, there was no occasion to determine whether the union's picketing of Jacksonville Terminal was in fact permissible as a matter of federal labor law but only whether the conduct was "protected" from state regulation. *Id.* at 382 n.17.[43]

On that issue, the Court said:

> "We have thus far concluded that although the Florida courts are not pre-empted of jurisdiction over this cause . . . , the issues therein are governed by federal law . . .; that the Railway Labor Act permits railway employees to engage in *some* forms of self-help, free from state interference . . .; and, drawing upon labor policies evinced by the National

[42] The court of appeals ignored this language and concluded instead that this Court had "inquired directly whether secondary picketing is a lawful method of self-help, one Congress meant to leave unregulated, and held that it is." Pet. App. A 16a. The court of appeals reached this conclusion based on its belief that this Court had found NLRA preemption principles "unhelpful." *Ibid.* In fact, however, this Court recognized the NLRA to be the "relevant corpus of 'national labor policy,'" noted that it had frequently referred to the NLRA for assistance in interpreting the RLA and expressly declared that it was doing so again. 394 U.S. at 383.

[43] In "mapping out the very general boundaries of self-help under the Railway Labor Act" (*Jacksonville Terminal*, 394 U.S. at 391), the Court noted that the "common situs" activity presented in that case might well have been permissible under NLRA standards. *Id.* at 389-390. Thus, the Court apparently was influenced by the possible legitimacy of the picketing before it under NLRA principles. The purely secondary nature of the picketing in the present case contrasts starkly with the facts in *Jacksonville Terminal*; the picketing here plainly would be unlawful under the standards in the NLRA. See pp. 29-35, *supra*.

> Labor Relations Act . . . that such protected self-help includes peaceful 'primary' strikes and nonviolent picketing in support thereof . . . and that it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited . . . ." *Id.* at 390 (emphasis in original).[44]

Because no definitive conclusion could be drawn from the RLA on the preemption issue presented, the Court was careful to mold its holding to the specific context of the case before it:

> "Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against *state* proscription." *Id.* at 392-393 (emphasis added).

Thus, the teaching of the *Jacksonville Terminal* decision is not, as the court of appeals concluded, that all secondary picketing is lawful under the RLA.[45] It had no reason to decide that issue in order to dispose of the preemption issue. Nor is it necessary for the Court in this case to mark the outer bounds of prohibited secondary conduct under the RLA. In contrast to the facts in *Jacksonville Terminal*, petitioners carry on no joint operations and maintain no joint facilities with MEC/PT. Thus, there would have been no "common situs" picketing and, as the district court found, no petitioner had "substantially aligned" itself with or become an "ally" of MEC/PT by providing any form of extraordinary aid or assistance which might have converted its status from that of a neutral secondary carrier to that of a primary disputant with BMWE. Pet. App. 32a-36a. Consequently, this case presents the Court with both the opportunity and the obligation to hold on the basis of the policy and structure of the RLA, as influenced by the standards of the ICA and NLRA, that Congress did not intend in enacting the RLA to authorize pure secondary picketing by a rail union.

[44] Indeed, if this Court had concluded that Congress intended rail unions to be permitted as a matter of federal law to engage in purely secondary picketing, it surely would have said so, thus significantly truncating its discussion of the preemption issue.

[45] Several subsequent federal court decisions have rejected the argument that *Jacksonville Terminal* held purely secondary conduct to be lawful under the RLA. *See, e.g., Marriott In-Flite Services* v. *Local 504, Air Transport Div.*, 557 F.2d 295, 297 n.4 (2d Cir. 1977); *In re Brotherhood of Ry., Airline & Steamship Clerks*, 605 F.2d 1073, 1075 (8th Cir. 1979); *Terminal R. Ass'n of St. Louis* v. *Brotherhood of Ry., Airline and Steamship Clerks*, 458 F. Supp. 100, 103 (E.D. Mo. 1978) ("The Supreme Court [in *Jacksonville Terminal*] did not say that all secondary activity by railroad unions against railroad employers is legal").

II. THE NORRIS-LaGUARDIA ACT DOES NOT PROHIBIT A FEDERAL COURT FROM ENJOINING SECONDARY PICKETING OF RAILROADS THAT VIOLATE THE RAILWAY LABOR ACT.

A. Notwithstanding Its Broad Language, Congress Did Not Intend The Full Sweep Of The Norris-LaGuardia Act To Apply To Cases Arising Under The RLA.

In 1932, Congress passed the Norris-LaGuardia Act[46] to limit the authority of federal courts to enjoin specified labor union activities in cases involving or growing out of a labor dispute. The language of the Act is broad—"[n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute . . ." But this Court has routinely declined to give it an unyielding sweep in cases arising out of the Railway Labor Act. See, e.g., *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971). See also pages 42-45, *infra*. These decisions reflect the concern during the Norris-LaGuardia Act debates that its scope might prevent the federal courts from enjoining strike activities in the rail industry that would prevent the railroads from performing their common law and statutory duties or that would violate the RLA.

[46] Act of March 23, 1932, c. 90, 72d Cong. 1st Sess., 47 Stat. 70, 29 U.S.C. §§ 101-115.

Representative Beck argued against the bill, contending that, if it had been law at the time of *United States* v. *Debs*, 64 F. 724 (N.D. Ill. 1894) *pet. for writ of habeus corpus denied sub nom. In re Debs*, 158 U.S. 564 (1895), it would have prevented the issuance of the injunction in that case that prohibited a secondary boycott of the Pullman Company. Congressman Beck thought that depriving the courts of power to enjoin such conduct under the proposed legislation, as he understood it, would allow "the railroad brotherhoods . . . to tie up every railroad in the United States" over a wage dispute. 75 Cong. Rec. 5472, 5476, 5500 (1932). He therefore proposed an amendment that would have provided that courts would still be free to restrain "the obstruction of any instrumentality of interstate or foreign commerce, as railroad[s] . . . ." *Id.* at 5474.

Representative LaGuardia, the Act's namesake, insisted that the proposed amendment was "not at all necessary." 75 Cong. Rec. 5504. He explained why in response to questions by Representative Lankford. Lankford stated that "[w]e do not want to see any condition arise [such as the *Debs* strike] where the public utilities are put out of business or ruined and the public is made to suffer" and asked whether the bill would "make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?" *Id.* at 5499. LaGuardia answered: "[T]he railroad labor act . . . *takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this* for the reason that we provided the machinery there for settling labor disputes." *Ibid.* (emphasis added). Mr. Lankford persisted: "It [the bill] does not apply to the transportation of . . . necessities that go in interstate commerce?" Mr. LaGuardia replied: "Interstate traffic is *entirely covered* in the railroad labor act of 1926." *Ibid.* (emphasis added).[47] Following LaGuardia's explanation that the RLA already took "care of the whole labor situation pertaining to the railroad" and that the amendment therefore was unnecessary, the proposed amendment was defeated.

[47] Representative LaGuardia chided Representative Beck for raising groundless fears based "entirely on the interruption of transportation of interstate traffic when there is another law [the RLA] which will take care of that situation. Gentlemen, this bill does not—and I cannot repeat it too many times—this bill does not prevent the court from restraining any unlawful act." 75 Cong. Rec. 5478.

The proceedings in the Senate were likewise irreconcilable with the court of appeals' holding that no injunction can be issued in a Railway Labor Act case. On the floor, the question was raised whether the bill would legislatively overrule *Texas & N.O. R.R.* v. *Brotherhood of Railway & Steamship Clerks*, *supra*, under which violations of § 2 Third of the Railway Labor Act could be enjoined. 75 Cong. Rec. at 4936 (remarks of Sen. Steiwer).[48] Senator Blaine stated that it would not, because the Railway Labor Act confers "certain rights under substantive laws," and the proposed legislation could not be construed to abridge rights under "any substantive law, . . . certainly not with respect to the substantive law written into the railway labor act." *Id.* at 4937-38. The Senate Report recognized that "injunctive relief is often the only adequate and effective relief against any wrongs and to prevent many irreparable injuries in controversies of infinite variety," and stated that "[i]t is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process, unlawful acts or acts of fraud or violence." S. Rep. No. 163, 72d Cong., 1st Sess. 11 (1932).

Thus, the legislative history of the Norris-LaGuardia Act indicates strongly that injunctive relief would remain available to remedy violations of the RLA, such as the

[48] Section 2 Third provided, at the time in question, that "[r]epresentatives, for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." *See* 281 U.S. at 557-58.

BMWE's pure secondary picketing. Senator Blaine and Representative LaGuardia, sponsors of the legislation in their respective Houses, assured their colleagues that the bill would not lead to an expansion of railroad strikes, such as that approved by the decision below. See generally *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).[49]

B. This Court Has Held That The Norris-LaGuardia Act Ban On Injunctions Must Accommodate The Purposes Of The RLA.

Consistent with this history, this Court has established in a long series of decisions that the literal terms of Norris-LaGuardia must give way to the underlying policies of the RLA and that an injunction may issue to enjoin conduct found to be contrary to the RLA's purposes. "We have held that the [Norris-LaGuardia] Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 772 (1961).[50]

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[49] As this Court recognized in *Toledo, P. & W. R.R.*, "The [Norris-LaGuardia Act] did not entirely abolish judicial power to impose previous restraint in labor controversies." 321 U.S. at 58.

[50] In *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 563 (1937), decided shortly after the passage of Norris-LaGuardia, this Court, in ordering the railroad to recognize and bargain with a union certified by the National Mediation Board, found that Norris-LaGuardia did not "render nugatory" the provisions of the RLA. Similarly, in *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 237 (1949), the Court found that Norris-LaGuardia did not bar an injunction against a union's enforcement of racially discriminatory collective bargaining agreements that were inconsistent with the mandates of the RLA first discerned by the Court five years earlier in its seminal decision in *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944). *See also Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952).

The RLA was amended in 1934, two years after Norris-LaGuardia's passage, and at that time Congress added an express provision setting out the purposes of the Act. As a result, this Court has ruled that, in the event of a conflict between the policies of the two statutes, the RLA should prevail "under familiar principles of statutory construction." *Chicago & N. W. Ry.* v. *United Transportation Union*, 402 U.S. at 582 n.18. *See also Virginian, Ry.*, 300 U.S. at 563.

In *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957), the Court enjoined the union from striking over minor disputes that were pending before the National Adjustment Board, *despite the absence of an express prohibition of such self-help in the Act*, because to have permitted such conduct would have been inconsistent with the basic purpose of the Act:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the *obvious purpose* in the enactment of each is preserved. We think that the *purposes* of these Acts are reconcilable." 353 U.S. at 40 (emphasis added).

See *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963).

Most recently, in *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971), this Court approved the use of an injunction to enforce the general obligation contained in Section 2 First of the RLA, 45 U.S.C. § 152 First, that both management and labor "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce." This Court had previously characterized the duty reflected in Section 2 First as "the heart of the Railway Labor Act" in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 377-378. Based on the evident purpose of Congress in creating this obligation, this Court concluded that Norris-LaGuardia would not stand in the way:

> "If we have misinterpreted the congressional purpose, Congress can remedy the situation by speaking more clearly. In the meantime we have no choice but to trace out as best we may the uncertain line of appropriate accommodation of two statutes with purposes that lead in opposing directions." 402 U.S. at 582.

Thus, this Court approved the use of an injunction "when such a remedy is the only practical, effective means of enforcing" the duties and obligations emanating from the RLA. 402 U.S. at 583.[51]

These decisions and others of this Court in the labor arena [52] compel the conclusion that the court of appeals erred when it found that the district court was powerless, as a result of Norris-LaGuardia, to enjoin BMWE's secondary picketing, even if such conduct violated the RLA. Pet. App. 17a-19a.[53] BMWE's duty to refrain from

[51] The Supreme Court's decision in *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), relied on by BMWE in the court of appeals, supports the petitioners' position here because the union's conduct in that case, "far from violating the Railway Labor Act . . . was in obedience to the Act's command." 362 U.S. at 339. The secondary picketing threatened here, in contrast, is totally inconsistent with the purposes and policies of the RLA.

[52] *See, e.g., Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 249-253 (1970); *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 458-459 (1957). *See also Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702, 708 (1982).

[53] The court of appeals erroneously interpreted *Chicago R. & I. R.R.* and *Toledo, P. & W. R.R.* as holding that an injunction is available to enjoin strikes while RLA processes are continuing, but that Norris-LaGuardia forbids resort to injunctions once these processes have been exhausted. Pet. App. 19a. Nothing in either decision supports such a distinction. If this Court finds that Congress intended to outlaw secondary picketing by rail unions, such as the BMWE's actions, then the prior decisions of this Court discussed above compel the conclusion that the Norris-LaGuardia Act does not prohibit effective injunctive relief.

spreading its primary dispute with MEC/PT through the picketing of purely secondary rail carriers such as petitioners emanates from the RLA and can only be enforced effectively through the issuance of an injunction in view of the irreparable injury that both the carriers and the public would suffer if such a disruption of interstate commerce were permitted to occur.

III. UNLESS THE TARGET OF PICKETING IS "SUBSTANTIALLY ALIGNED" WITH THE STRUCK RAILROAD, A SUIT TO ENJOIN SECONDARY PICKETING DOES NOT "INVOLVE OR GROW OUT OF A LABOR DISPUTE" WITHIN THE MEANING OF THE NORRIS-LAGUARDIA ACT.

There is an additional reason, based on the text of the Norris-LaGuardia Act itself, why the district court had jurisdiction to enjoin the BMWE's picketing. Very simply, this case is not one "involving or growing out of a labor dispute" within the meaning of Section 4 of the Norris-LaGuardia Act.

Section 4(a) of Norris-LaGuardia divests the federal courts of their injunctive powers only in cases "involving or growing out of" a "labor dispute." 29 U.S.C. § 104. A "labor dispute" is a "controversy concerning terms or conditions of employment, or concerning . . . representation . . . ." *Id.* § 113(c). "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry," or under certain other circumstances not relevant here. *Id.* § 113(a).

Section 13(a) must be read with Section 13(c) and in light of the statute's purpose. The case—*i.e.*, the suit for an injunction—must "involve or grow out of" a "controversy concerning terms or conditions of employment, or concerning . . . representation." In suits like this one to restrain secondary picketing, the case "involves or grows out of" the picketing, which is *not* a controversy concerning representation or terms or conditions of employment. The question of statutory construction that

must be resolved is whether, nevertheless, the case should be held to be one "involving or growing out of" the primary labor dispute on the ground that the injunction suit is part of a chain of events that began with, and would not have come about *but for*, the primary labor dispute.[54]

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[54] It is clear that there is no "labor dispute" between the BMWE and petitioners since the controversy between them does not concern either the representation of petitioners' employees or their terms or conditions of employment. *See Ashly, Drew, supra,* 625 F.2d at 1362. To be sure, Section 13(c) defines the term "labor dispute" without regard to "whether or not the disputants stand in the proximate relation of employer and employee." But this language cannot be understood without reference to the legislative history of the provision. Congress passed the Norris-LaGuardia Act to overrule a series of this Court's cases which had excluded unions and their activities from the protections of Section 20 of the Clayton Act because unions were not deemed to be "employees." *See, e.g., United States* v. *Hutcheson,* 312 U.S. 219, 229-30 (1941); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Ass'n,* 274 U.S. 37 (1927); *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921). Justice Brandeis dissented from this interpretation of § 20 because it ignored the interest of unions in organizing employees. *See, e.g., Duplex Printing,* 254 U.S. at 497, 480-83 (Brandeis, J., dissenting). *See also Ashley, Drew,* 625 F.2d at 1366; *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.,* 362 F.2d at 653 n.2.

Congress enacted the Norris-LaGuardia Act "expressly to overrule the majority opinion of *Duplex* and the cases that followed it and to affirm the philosophy of the dissenters in those cases." *Local Union No. 189 Amalgamated Meat Cutters & Butcher Workmen* v. *Jewel Tea Co. Inc.,* 381 U.S. 676, 703 (1965) (Goldberg, J., concurring). Thus, Congress "established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation." *United States* v. *Hutcheson,* 312 U.S. at 231. *See* H.R. Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932); *F. Frankfurter & N. Greene, The Labor Injunction* 165-76, 216 (1930); C. Gregory, *Labor and the Law* 193-94 (2d ed. 1958).

As the House report makes clear, Congress intended by the definitions in Section 13 merely to establish in the organizational arena that the Act "is broad enough to include others than the immediate disputants and thereby correct[] the law as announced in the case of *Duplex Printing Co.* v. *Deering. . . .*" H.R. Rep. No. 669, 72d Cong., 1st Sess. 10 (1932). Section 13 must be construed in light of this purpose.

In the context of secondary picketing of railroads, the courts (until the instant controversy) have consistently held that a relationship of a particular sort—called "substantial alignment"—must exist between the picketed (secondary) carrier and the struck (primary) carrier before a union can picket the secondary carrier. Perhaps because a different interpretation of Section 13 in the railroad context would lead to a result so clearly contrary to Congress' intent, those courts (including the Fifth and Eighth Circuits) have held, in essence, that Section 4 of the Norris-LaGuardia Act does not apply at all in cases involving picketing of neutral railroads—*i.e.*, railroads that are not "substantially aligned" with the struck carrier. See *Ashley, Drew,* 625 F.2d at 1363 (and cases cited therein).[55]

The substantial alignment test is consistent with the language of Section 4, and harmonizes that Section with overall national labor and interstate commerce law and policy. Interpretation of the governing language requires that the courts determine the point at which any

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[55] The Eighth Circuit in *Ashley, Drew* followed a long line of railway labor cases based on this principle. *See Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court,* 385 U.S. 20 (1966); *Consolidated Rail Corp.* v. *BRAC,* 84 Lab. Cas. (CCH) ¶ 10,924 (W.D.N.Y. 1978), *app. dismissed,* 595 F.2d 1208 (2d Cir. 1979); *Southern Ry.* v. *BRAC,* 458 F. Supp. 1189 (D.S.C. 1978); *Alton & Southern Ry.* v. *BRAC,* 84 Lab. Cas. (CCH) ¶ 10,835 (D.D.C.), *aff'd mem.* (D.C. Cir., Sept. 15, 1978), *cert. denied,* 439 U.S. 996 (1978); *Terminal Railroad Ass'n* v. *BRAC,* 458 F. Supp. 100 (E.D. Mo. 1978); *Western Maryland R.R.* v. *System Board of Adjustment,* 465 F. Supp. 963 (D. Md. 1979); *Chicago Transp. Co.* v. *BRAC,* 99 L.R.R.M. 3072 (N.D. Ill. 1978).

given activity is so remotely or tangentially related to the labor dispute that it cannot be said to "involve or grow out of" that dispute. It is a dividing line that must be drawn, and the courts must draw it. The *Ashley, Drew* "substantial alignment" test is appropriate for that purpose because it is not only consistent with the language of Norris-LaGuardia, it also accommodates the language and policies of Norris-LaGuardia with the broader policies of the Railway Labor Act and the Interstate Commerce Act.

The "substantial alignment" doctrine—like the analogous "ally" doctrine under the NLRA, see *Ashley, Drew*, 625 F.2d at 1367—is a judicial tool designed to "preserv[e] the right of labor organizations to bring pressure to bear on [primary] employers . . . [while] shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). It thus is a rule of necessity developed to preserve labor's right of picketing, and not, as the court of appeals states, a means of limiting that right. The doctrine allows the extension of picketing beyond the original dispute when the action of a secondary employer that is otherwise immune from picketing makes it essential that the union be entitled to self-help against the secondary employer. Put simply, a secondary employer is substantially aligned with a primary employer—and therefore subject to strikes or picketing—only if the secondary employer has "joined the fray" and thus, in effect, has assumed a role in the primary dispute.

Thus, "substantial alignment" exists if the struck carrier receives services from the secondary carrier that "*in fact* constitute an integral part of [the struck railroad's] day-to-day operations." *Atlantic Coast Line*, 362 F.2d at 651, *quoted in Ashley, Drew*, 625 F.2d at 1364 (emphasis in original). By the same token, "[m]utual participation in a strike insurance plan has been held to be a strong indication of substantial alignment." *Id.* at

1364 n.8 (citing *Southern Ry.* v. *BRAC*, 458 F. Supp. 1189, 1191-92 (D.S.C. 1978); *Alton & Southern Ry.* v. *BRAC*, 84 Lab. Cas. (CCH) ¶ 10,835, at 19,256-57 (D.D.C.), *aff'd mem.* (D.C. Cir., Sept. 15, 1978) *cert. denied*, 439 U.S. 996 (1978). Without indications of a "significant commonality of interest" between the struck and non-struck carriers, however, an injunction suit by the secondary employer is not a case involving or growing out of the original labor dispute for purposes of the Norris-LaGuardia Act.

The substantial alignment doctrine as applied here also properly protects the interests embodied in the Interstate Commerce Act. See *Ashley, Drew*, 625 F.2d at 1369. Under the ICA, petitioners have a "federal right to relief from unprivileged interference with the performance of . . . duties" to provide safe and adequate transportation service. *Id.* at 1370. Whether a union's activity is privileged can be decided on the basis of the relationship between the primary and secondary employer. A wholly innocent railroad—one that is not substantially aligned with the primary carrier—should be permitted to enforce by appropriate equitable relief its right to be free of interference in the performance of its federal statutory duties. Here the union's action was clearly not privileged; no one can seriously argue that the RLA *endorses* respondents' picketing. Accordingly, the substantial alignment test reasonably accommodates Norris-LaGuardia not only with the dictates of the RLA, but also those of the ICA.

As we have already discussed, the record in this case is devoid of facts that could support a holding that any petitioner has made itself a primary disputant in the dispute between the BMWE and the Maine Central. The undisputed facts of this case plainly establish that petitioners are not aligned with the Maine Central in any relevant way. Accordingly, Norris-LaGuardia should be no bar to an injunction against the secondary activities against petitioners threatened by BMWE.

CONCLUSION

The judgment of the court of appeals should be reversed.

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